Supreme Court, U.S.
FILED
SEP 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-6

In The

Supreme Court of the United States

October Term, 1990

BLOCK 173 ASSOCIATES,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

In the Respondents' Joint Brief In Opposition ("Joint Brief"), respondents acknowledge that they, as the municipal and private defendants below:[1] (a) determined to

[1] The municipal defendants, or respondents, include the City and County of Denver, the Mayor of Denver, the City Council of the City and County of Denver and its council members and the Denver Urban Renewal Authority. The private defendant or respondent is BCE Development Properties, Inc. ("BCED").

construct the Centerstone project[2] on the unblighted property of Block 173 Associates ("Block 173"); (b) advanced the project by devising an anticompetitive course of action with Block 173's property rights as a target; (c) understood that their intended conduct fell outside the scope of any state delegation of authority; and (d) attempted to conceal the lack of authority with a facade of compliance with the Colorado Urban Renewal Law ("CURL"), a state provision triggered only by the need to eliminate or prevent blight.

Thus, the case squarely presents the questions for review set out in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition"). In sum, the concern is whether municipalities and private conspirators can shield themselves from federal antitrust and civil rights liability by means of technical compliance with an inapplicable state law.

In response to the Petition, the defendants do not dispute the chronology of the Centerstone project, offer legal argument justifying their actions, or attempt to deny the importance of the matters raised. Instead, they seek to evade review through: (a) emphasizing their success in distracting lower tribunals from the primary issue of illegality, *see* Joint Brief at 7-10, 17; (b) characterizing their motives as blameless, *id.* at 2, 5-6; and (c) comparing their unauthorized actions to those of defendants acting in accordance with state law and policy, *id.* at 12-14, 16. In

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[2] As explained in the Petition and the Joint Brief, the Centerstone project was a multi-block, retail-commercial project to be built in downtown Denver. Block 173 Associates owned one of the blocks on which Centerstone was to be built.

essence, the defendants rely on their previous success in elevating illusion and form over reality and substance.

DISCUSSION

I. ACCORDING FEDERAL ANTITRUST IMMUNITY TO THESE DEFENDANTS DOES VIOLENCE TO THIS COURT'S PRIOR DECISIONS ON ANTITRUST IMMUNITY.

A. The activities of the municipal defendants were unauthorized by state statute and thus are not deserving of municipal immunity.

This Court has made it clear that a municipality is immune from antitrust liability only if it is acting under a state statutory delegation of authority. *E.g., Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985).[3] The potential immunity for municipal conduct is narrow, and designed to allow sovereign states latitude to effectuate a policy through a delegation of power to local governmental entities. *Id.*

The issue of municipal immunity entered this case solely because the defendants knew that the power of condemnation and the power to issue tax increment financing bonds were essential to BCED's successful development of Centerstone on petitioner's land. These

[3] The second requirement of municipal antitrust immunity is that the state statute evidence an affirmatively expressed and clearly articulated policy to displace competition. It is agreed that CURL does manifest a policy to displace competition. Petition at 8a. Hence, the satisfaction of the second prong of the *Town of Hallie* test is not in dispute in this case.

powers could be available to them only through CURL. Joint Brief at 3; Petition at 25a-26a.

However, the defendants' need for the powers authorized in CURL did not make the statute applicable to their intended development of Centerstone. CURL is not an all-encompassing delegation of authority available to municipalities whenever officials determine that its employment is in the public interest. The delegation is limited to those situations in which CURL powers are necessary to combat and eliminate blight. *See* Colo. Rev. Stat. § 31-25-102, Petition at 73a-74a; Colo. Rev. Stat. § 31-25-107(1), Petition at 86a.

Thus, the defendants had to deal with two realities: (a) a finding of blight was a jurisdictional prerequisite for CURL; and (b) no blight existed on the Centerstone blocks. They therefore developed a scheme whereby the urban renewal study area was broadened to encompass the geographic area surrounding the Centerstone blocks. After the expansion reached a fifteen-block area, the obligatory blight was found. Armed with this artificial blight finding, the defendants invoked CURL provisions. They then carefully followed the technical requirements of the CURL process as they moved toward construction of Centerstone on the three unblighted blocks.

The defendants' theory is that they, along with other municipalities, can gain immunity from the provisions of federal antitrust law by clothing their actions with the appearance of state authorization. Their notion is contrary to the prior cases of this Court and the policies of antitrust law. A much-earlier attempt to conceal reality

through strict compliance with legalities met with the following reaction in this Court:

> It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it are to proceed according to the strictest form of the law.

Graham v. Burgess, 117 U.S. 180, 186 (1886).

The lower federal courts' approach in the instant case stands in contrast to this Court's consistent refusal to accept form over substance. The United States District Court for the District of Colorado refused to look behind the record of compliance with CURL to find that CURL, in fact, was inapplicable. *See* Petition at 35a-36a.[4] The Tenth Circuit followed suit. *See* Petition at 9a-10a.[5] In

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[4] The district court stated:

> The undisputed evidence indicates that the defendants facially complied with all statutory requirements.
>
> . . .
>
> [T]he fact that the defendant BCED may have been identified as the "first choice" developer of the Centerstone Project before the financing method was selected, and before the blight study was conducted, does not violate any statutory provision with respect to implementation of an urban renewal plan under Colorado law.

Petition at 35a-36a.

[5] The Tenth Circuit stated:

> We agree with the district court that the blight study comported with the statutory definition of "blighted

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effect, these courts equated the requisite state authorization with technical compliance with statutory procedures.

The approach taken below restricts the federal judiciary to a formalistic review of the record generated by a municipality. Courts confined to such a narrow task cannot be in a position to determine whether a municipality took an anti-competitive action in a good-faith attempt to effectuate a state delegation of authority, or whether the municipality's record concealed illegal and unimmunized anticompetitive conduct.[6]

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area" as set forth in Colo. Rev. Stat. § 31-25-103(2) (1986).

. . .

Following the adoption of the urban renewal plan according to the procedures of Colo. Rev. Stat. § 31-25-107, DURA sent out a prospectus and conducted a competitive bidding process as described in Colo. Rev. Stat. § 1-25-106(2) (1986).

Petition at 9a-10a.

[6] In claiming that the circuit courts of appeal are in accord on this issue and that the case law supports their interpretation of the immunity doctrine, the defendants rely on citations to inapposite cases. *See* Joint Brief at 13, 16-17. The cases cited deal with situations in which: (a) the municipality was concededly acting in good faith under a state urban renewal law for the purpose of eradicating a slum or blighted area; but (b) in exercising its delegated authority, the city allegedly abused its discretion or imperfectly carried out the statutory mandates. *See Boone v. Redevelopment Agency*, 841 F.2d 886, 891 (9th Cir. 1988) ("[I]t does not follow that the city and agency would be stripped of antitrust immunity merely because they imperfectly exercised their power under state law."); *Scott v. City of*

(Continued on following page)

The doctrine of municipal immunity was created, defined and applied by this Court as a matter of federal law. It makes little sense to allow the immunity to hinge on the ability of a municipality to create a formalistic record of compliance with a state statute.[7] A meaningful review of the municipality's action must include an inquiry into the scope of the state authorization.[8]

B. The activities of BCED are not deserving of *Noerr-Pennington* immunity.

An undisputed aspect of this case is that the entire scheme to utilize CURL in the development of

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Sioux City, Iowa, 736 F.2d 1207, 1215-16 (8th Cir. 1984) ("State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors.").

The facts of these cases are not comparable to the facts of the instant case. Here, the record shows deliberate abuse and exploitation of CURL authority, not a good-faith, but perhaps mistaken, exercise of authority.

[7] This standard makes even less sense when it is compared with the strict standard of review given to the issue of whether the state has authorized anticompetitive conduct. *See, e.g., Town of Hallie*, 471 U.S. at 39-46; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 49-57 (1982).

[8] Contrary to defendants' assertions, *see* Joint Brief at 13-16, the circuit courts of appeal have applied two different levels of review in examining the existence of state authority. *Compare Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983). The Tenth Circuit opinion in this case is an extreme form of the relaxed level of review.

Centerstone was jointly devised and executed by the municipal defendants and BCED. From the inception of the plan, BCED was deeply entangled in the Centerstone operation. *See* Joint Brief at 3. BCED actually named and designed the project. Once it succeeded in enlisting municipal aid, it was given the primary responsibility for setting the boundaries of the sham urban renewal area.[9] The final drafts of the urban renewal plan and the city council's ordinance approving the plan were authored by BCED's attorney.[10] After the municipality formally adopted the ordinance, "exclusive negotiations" were conducted with BCED. Joint Brief at 6. Not surprisingly, BCED was eventually selected as the developer of the Centerstone project. *Id.* at 7.

Hence, BCED's involvement in Centerstone went far beyond activities fairly characterized as legitimate First Amendment efforts to influence governmental policy. The case thus affords this Court with an opportunity to address the often-discussed "co-conspirator exception" to *Noerr-Pennington* immunity from antitrust liability.[11]

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[9] Record, Deposition of Lamont at 188; Deposition of McFadyen at 214-18.

[10] Record, Deposition of Cheroutes at 51-52; Deposition of McFadyen at 402-403.

[11] *See, e.g., Affiliated Capital Corp. v. Houston*, 735 F.2d 1555, 1567 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053 (1986); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975).

II. THE TENTH CIRCUIT'S RESOLUTION OF THE CIVIL RIGHTS CLAIM IS INCOMPATIBLE WITH THIS COURT'S PRIOR DECISIONS.

The defendants chose to open their civil rights discussion, Joint Brief at 18, with a quotation from *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). This particular quotation illustrates the fallacy of both the defendants' position and the reasoning of the lower courts. In *Berman*, this Court considered a civil rights challenge to urban renewal legislation. In affirming the legislative right to enact such a statutory scheme, the Court stated: "[W]hen the *legislature* has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman*, 348 U.S. at 32 (emphasis added).

Here, it is manifest that the Colorado legislature has not spoken. The only declaration of a public purpose is the determination of BCED and the municipal defendants that the deprivation of Block 173's property rights would provide economic stimulation of downtown Denver's retail trade. For the purposes of civil rights liability, this self-serving determination cannot be the equivalent of a declaration by the Colorado legislature.[12] Where a municipality, along with private entities, purports to act under the color of state law, the issue is not whether the action was taken for *any* public purpose. The inquiry must focus on whether the action promoted a purpose

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[12] In fact, it is manifest that the taking of the petitioner's property for the Centerstone project was not contemplated by CURL. *See supra* § I(A).

authorized by the state itself.[13] Otherwise, actions of a municipality would be accorded the deference appropriate only for a sovereign state.

Admittedly, there is a lack of federal case law describing the proper yardstick with which to measure the civil rights liability of municipal and private defendants under these circumstances. *See* Joint Brief at 19. This absence of unambiguous authority in itself justifies a grant of certiorari on the issue.

CONCLUSION

The Respondents' Joint Brief in Opposition provides further support for the granting of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit requested by Petitioner Block 173 Associates. Petitioner therefore respectfully requests a writ of certiorari to be granted in this case.

Respectfully submitted,

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September 1990

[13] The defendants' citation to *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), Joint Brief at 19, is nonsensical in this context. *Berman v. Parker*, 348 U.S. at 32, stands for the proposition that the constitutionality of an action taken under the color of an urban renewal law is determined by its conformity with the legislative purpose. Consequently, legality under the state law is not only relevant, it is dispositive.